

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
LETTERS PATENT APPEAL No 129 of 1997
in
SPECIAL CIVIL APPLICATION No 6226 of 1996

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR.K.G.BALAKRISHNAN and
MR.JUSTICE S.D.DAVE

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgement?-Yes.

2. To be referred to the Reporter or not?-Yes. :

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?-No.

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?-No.

5. Whether it is to be circulated to the Civil Judge?-No. :

ZOROASTRIAN CO OPERATIVE HOUSING SOCIETY LTD

Versus

DISTRICT REGISTRAR CO OP. SOCIETIES (URBAN)

Appearance:

MR MIHIR H JOSHI for Appellants
RULE SERVED BY DS for Respondent No. 1
MR RAVINDRA SHAH for Respondent No. 2
MR SHIRISH JOSHI for Respondent No. 3/A
Mr.A.J. Patel for respondent No.3 and 3/B.

CORAM : CHIEF JUSTICE MR.K.G.BALAKRISHNAN and
MR.JUSTICE S.D.DAVE

Date of decision:23/07/1999

C.A.V. JUDGEMENT: (Per K.G. Balakrishnan, C.J.)

1. This is an appeal directed against the judgment of the learned single Judge in Special Civil Application No.6226 of 1996. Original petitioners are the appellants. The first appellant is a Cooperative

Society, registered under the Bombay Cooperative Societies Act, 1954 and the second appellant is its member and the President. The main object of the appellant Society is the construction of houses meant for residential purpose and the allotment of the same to its members. The second respondent herein, who is a Member of the Society, was allotted a house, and in 1985, he made an application for converting his residential house into a commercial building. That application was rejected on the ground that the commercial use was prohibited under the byelaws. In 1988, second respondent made an application for development by constructing a nine-storeyed building with 56 residential flats and the appellant-Society gave permission on condition that the flat should be allotted only to persons belonging to Parsi community. According to the appellants, no construction was started by the 2nd respondent. However, the appellants, apprehending that the 2nd respondent would transfer the building to non-Parsis, filed a suit before the Board of Nominees for staying the construction. The Board of Nominees directed to maintain status quo, but after hearing the parties, the order was vacated and the matter was taken up in revision before the Gujarat State Cooperative Tribunal. The order passed by the Board of Nominees was confirmed. In the meantime, on 2.5.1995, the Registrar of Cooperative Societies issued a direction to the appellant-Society that the condition prohibiting the transfer of property to non-Parsis be deleted. The 2nd respondent had filed an application for transfer of membership in respect of his plots. The appellant Society rejected this application and an appeal was filed by the 2nd respondent against this rejection. In the Special Civil Application, the appellants have challenged the proceedings pending before the District Registrar of Cooperative Societies and also seeking a writ of certiorari to quash the order passed by the Cooperative Tribunal and also to restrain respondents 2 and 3 or their agents from putting up any construction in the plots. The learned single Judge, after elaborately considering the questions involved in the matter, dismissed the Special Civil Application. Aggrieved by the same the appellants have filed this Letters Patent Appeal.

2. We heard the appellants' counsel Shri Mihir Joshi, the counsel for respondents 3 and 3/B Mr.Arvind Patel and the counsel for respondent No.3/A Mr.Shirish Joshi.

3. The counsel for the appellants contended that the appellant-Society was formed by a group of persons,

belonging to Parsi community, and the Society was registered as a Housing Society in the year 1926 under the old Bombay Act. The byelaws of the Society restricted its membership to members of the Parsi community. According to the appellants, clause 7 of the byelaws is to the effect that all persons, who have signed the application for registration, are original members. Other members shall be elected by the Committee provided that all members shall belong to the Parsi Community. The 2nd respondent, who is a member of the Parsi Community, was allotted bungalow No.7 and he intended to develop this after demolishing the existing residential building. As the appellants apprehended that he would transfer the reconstructed building to non-Parsis, they initiated the proceedings before the Board of Nominees. According to the appellants, the 2nd respondent has no authority to transfer the property to non-Parsis and the appellant-Society cannot be compelled to have members not belonging to Parsi Community. The appellants would contend that the directions of the Registrar are violative of Articles 19(1)(c) and 21 of the Constitution and the byelaws of the appellant-Society. The appellants have contended that if 56 persons, not belonging to Parsi community, were to occupy the residential flats, it would be against Sections 24 and 73 of the Cooperative Societies Act. The appellants have contended that no person has got a fundamental right to become a member of the Society as it is only a statutory right given by the relevant Act and the provisions contained in the Act and the appellant-Society would be well within its rights to deny membership to a person, who is not qualified as per the byelaws.

4. It was argued on behalf of the appellant-Society that the membership of the Society can be restricted to a section of the community and the appellant Society, which was formed exclusively by the members of the Parsi Community, cannot be asked to include members belonging to other community as its members. The counsel for the appellants contended that the appellant-Society has an unfettered discretion to reject any application for membership and any direction by the Registrar to admit a person as a Member of the Society would be violative of the fundamental right of the appellant-Society guaranteed under Article 19(1)(c) of the Constitution. The appellant-Society would also contend that the directions of the Registrar are mala fide and beyond the statutory power given to the Registrar under the Act.

5. As regards membership of the Cooperative Society, Sections 22, 23, and 24 are the relevant provisions in

the Act read with

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District Cooperative Sale and Purchase Union Ltd. & Ors. v. State of Gujarat, XXV (2) : 1984 (2) GLR 1244, the Constitutional validity of Sections 22 and 24 of the Act was challenged and the Division Bench of this Court held that sub-section (2) of Section 22 and the whole Section 24 are violative of the provisions of the Constitution as they infringe the fundamental rights guaranteed under Article 19(1)(c) of the Constitution. Section 22(1), which is the remaining provision, reads as under :-

"22.(1) Subject to the provisions of Sec. 25, no person shall be admitted as member of a society except the following, that is to say-

- (a) an individual, who is competent to contract under the Indian Contract Act, 1872;
- (b) a firm, company, or any other body corporate constituted under any law for the time being in force or a society registered under the Societies Registration Act, 1860;
- (c) a society registered, or deemed to be registered, under this Act;
- (d) the State Government;
- (e) a local authority;
- (f) a public trust registered or deemed to have been

Public Trusts Act, 1950."

Rule 12(2) of the Rules, which is relevant, reads as under :-

"12... (2) No cooperative housing society shall without sufficient cause, refuse admission to its membership to any person duly qualified therefor under the provisions of the Act. And its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house

and no such society shall without sufficient cause, refuse to give permission to any existing member thereof to sell or transfer his plot of land or house to another pers....

its member...."

The Constitutional validity of the above Rule 12(2) of the Rules was challenged and a Division Bench of this Court in Jain Merchants Co-op. Housing Society Ltd. & Ors. v. H.U.F. of Manubhai Kalyanbhai Shah Through its Manager Harishbhai Manubhai Shah & Ors., XXXVI(1) : 1995(1) GLR 19, held that Rule 12(2) was not violative of the provisions of the Constitution. In that decision, it was held :-

"... Once it is held that there is a right to be considered for being a member and the consideration means a fair consideration, it is implicit in the very nature of things that the membership cannot be refused or denied at pleasure and in case the Membership is refused on any flimsy or trivial ground, the matter can be agitated before the Court or the concerned authority. Thus, we find that the Society is not clothed with such unfettered power and if at all the society refuses or denies membership on some flimsy and trivial ground, it will be open to the aggrieved party to move the Court or the authorities under the Act. When there is a right and remedy available to the person, who has been denied the membership, it does not stand to reason to accept the contention of Mr.Zaveri that the petitioner-Society has any such absolute right...."

6. The question that is to be considered is whether a housing Society, registered under the Cooperative Societies Act and founded by members of a particular religious community, could restrict the membership of the society exclusively to the members of that community. No decision has been brought to our notice on this specific question, but similar questions were considered in a series of decisions. In Daman Singh and others v. State of Punjab and others, AIR 1985 SC 972, certain provisions contained in the Punjab Cooperative Societies Act were challenged. The provisions contained in the said Act prov....

Societies, if it is necessary in the interest of the said Cooperative Societies. The protection of Article 31A(1)(c) was held to be available and it was observed by the Honourable Supreme Court that in view of Article 31A(1)(c), the provision for amalgamation of the two cooperative societies cannot be challenged on the ground of violation of Articles 14 and 19 of the Constitution. In that case, it was observed in paragraph 10 as under :-

"... The protection of Art. 31-A(1)(c) cannot be said to be not available to S.13(8) of the Act as the interest of a cooperative society may not necessarily be in the public interest or for the proper management of the society. The very philosophy and concept of the Cooperative movement is impregnated with the public interest and the amalgamation of Cooperative Societies when such amalgamation is in the interest of the Cooperative Societies is certainly in the public interest or can only be to secure the proper management of the societies...."

7. In State of U.P. and another v. C.O.D. Chheoki Employees' Cooperative Society Ltd. and others, (1997) 3 SCC 681 the question that arose for consideration was whether the reservation of seats of Scheduled Castes, Scheduled Tribes, O.B.Cs. and Women in election and their nomination by the Government....

violate the fundamental rights guaranteed under Article 19(1)(c) of the Constitution and the Supreme Court held :-

"... No citizen has a fundamental right under Article 19(1)(c) to become a member of a Cooperative Society. His right is governed by the provisions of the statute. So, the right to become or to continue being a member of the society is a statutory right. On fulfilment of the qualifications prescribed to become a member and for being a member of the society and on admission, he becomes a member. His being a member of the society is subject to the operation of the Act, rules and bye-laws applicable f....

time...."

As regards the challenge under Article 19(1)(c), it was observed as under :-

"... Though Article 19(1)(c) gives freedom to form association, it is controlled by the provisions of the Act. As held by this Court, once a society has been registered under the Act, the management of the society through Section 29 and the Rules made thereunder, is regulated by duly elected members. In the democratic set-up, all eligible persons are entitled to contest the election, as held, according to the provisions of the Act and the Rules. In the absence of elected members belonging to the weaker sections and elected women members, their nomination by the Government is the alternative dispensation envisaged as one of the policies of the Act. Therefore, the Court cannot interfere with the policy and declare it unconstitutional violating Article 19(1)(c) of the Constitution...."

8. In an earlier decision of the Gujarat High Court, a learned single Judge of this Court in Vrajlal Jagjivandas Pandya v. Dr. Jaswantlal Shivilal and another, AIR 1977 Gujarat 131, held that the right or interest of the allottee member of the Society to occupy building which may be built by the Society is the species of property which is transferable and therefore liable to attachment in execution of a money decree obtained against the member. In that case, the building was not built and allotted to the member. The society contended that unless the building is built and allotted to the member, he would not acquire any interest in the property, but this contention was repelled that the land represented the member's contribution in the Society towards the land purchase account because there is a clear dichotomy made by the Act between the right or interest of a member in the property and the right or interest in the capital of the Society and it was held that the land is liable to be attached in execution of a decree obtained against the member.

9. In Burmah Shell Cooperative Housing Society Ltd. and another v. Chief Commissioner of Income Tax, 1995 Supp. I SCC 533, a property belonging to a member of a housing society was auctioned by the Income Tax Department and the same was purchased by a Non-resident Indian. The appellant-Society contended that the byelaws of the Society permitted only a resident of Delhi, who

was not owning any other property to become a member of the housing society. The auction purchaser was neither a member of the Society nor a resident of Delhi. Therefore, the sale was challenged by the housing society. The Delhi High Court dismissed the writ petition and the same was confirmed by the Supreme Court.

10. In Ramesh Himmatlal Shah v. Harsukh Jadhavji Joshi, AIR 1975 SC 1470, a flat was sold in executio....

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a decree obtained against the allottee. The judgment debtor was the tenant of the flat in a Co-partnership Housing Society under the Maharashtra Cooperative Societies Act, 1960. There, the Supreme Court held :-

"... There is no absolute prohibition against transfer of a right to occupation of the flat or even to transfer a share. The auction-purchaser is presumed to know the limitations under which he has purchased the right to occupy the flat in court auction. If ultimately the Society turns down his application for membership (which of course cannot be done except for valid reasons) it is upto him to take such course of action as available under the law. Such a remote contingency, per se, will not make the particular right of the judgment-debtor in the flat non-attachable or non-saleable...."

"... Further, as the right to occupation of a flat is property both attachable and saleable, specific non-inclusion of a particular species of property under Section 60 is not of any consequence if it is saleable otherwise...."

11. In Smt. Damyanti Naranga v. The Union of India and others, 1971(1) SCC 678, a slightly different approach is seen to have been adopted, but the same could only be stated to be for the special facts of the case. The facts in that case were that some eminent educationists of Benares founded an association under the name "Hindi Sahitya Sammelan", for propagation of Hindi language. This association was registered under the Societies Registration Act. Society acquired landed

properties and buildings. Differences arose between members of the Society and some wanted to alter the constitution of the Society and this led to litigation between parties. In view of these circumstances, the U.P. Legislature passed U.P. Hindi Sahitya Sammelan Act, 1956 and a new statutory body was created by name "Hindi Sahitya Sammelan" and management and properties of the original society Hindi Sahitya Sammelan were to be taken over by the said statutory body. The provisions contained in the Act were challenged on the ground that they infringed the fundamental rights under

19(1)(c) of the Constitution. It was held :-

".. The new Sammelan is not identical with the society since the rights enjoyed by the members of the society are materially altered under the Act. The right to form association implies that the persons forming association have also the right to continue to be associated with only those whom they voluntarily admit in the association. The right under Article 19(1)(c) can be effective only if it is held to include within it the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association. Thus, right to f....

right to its continuance and any law altering the composition of the Association compulsorily will be a breach of the right to form the association...."

It was also observed by the Supreme Court :-

"... The total deprivation of property, instead of regulating the affairs of the society or its properties, cannot clearly be justified as a reasonable restriction in public interest. If the law is passed not merely for ensuring proper management and administration of the property, but for totally depriving the persons, in whom the property vested, of their right to hold the property, the law cannot be justified as a reasonable restriction under Article 19(5)...."

12. The learned counsel of the appellants contended that the appellant-Society was founded by members of a minority community and they are entitled to protect their cultural heritage and values and, therefore, it is urged that if any person other than a member of Parsi Community is inducted as a member of this housing society, that would seriously jeopardize their fragile culture and the developmental activities would even pollute the adjacent worshipping places. The opposition is not against the conversion of housing plot for developmental activities, but the flats that are converted shall not be given possession to non-Parsis. It is true that Parsi community

under Article 30 of the Constitution. Zoroastrianism is an ancient religion of Iran and in 10th Century A.D., members of this community migrated to India and are known as "Parsis". In the New Encyclopaedia Britannica, Volume 12, 15th Edition, at page 936, following reference is made :-

"... Between the 8th and 10th centuries religious persecution and forced conversion to Islam led some of the remaining Zoroastrians to leave Iran and settle in India, most of them eventually in the region of Bombay. By the 19th century these Zoroastrians, called Parsees, were distinguished for their wealth, education, and beneficence. In the 19th century the Parsees renewed contact with the only remaining Zoroastrians in Iran, the Gabars. These two groups today are the surviving representatives of the religion of Zoroaster. Zoroastrian worship is most distinctively characterized by tendance of the temple fire...."

We are told that there is decline in the number of members of this community.

13. The appellant's counsel contended that Parsi Community being a religious minority, its Society is entitled to get protection of Article 19(1)(c) of the Constitution, and relied on the decisions of the Supreme Court in *Lily Kurien v. Sr. Lewina and others*, (1979) 2 SCC 124 and *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558. Both the above decisions relate to educational institutions. In *Lily Kurien* (*supra*), it was held that the blanket powers given to the Vice Chancellor to order reinstatement as well as the nature

of punishment in respect of a Principal of an educational institution managed by the minority community would violate Article 31 of the Constitution.

14. The decision in St. Stephen's College (*supra*) also concerns the right of a minority community to administer educational institutions. It was held that the right of minorities to establish educational institutions cannot be denied by the State or instrumentality, i.e. University, by depriving such institution of their minority character by requiring their compulsory affiliation to the University.

15. We do not think that the above two decisions could come to the rescue of the appellant to contend for the position that the Parsi community, being a minority community, is entitled to have a cooperative society of their choice as the cooperative societies could only function under the statutory restrictions imposed under the statute.

16. From the above judicial pronouncements, concerning Cooperative Societies, certain principles are clear. The cooperative societies are organized for certain purposes and objectives, such as economic interest and general welfare of its members. Though they are not statutory creatures, it is fully guided and controlled by statutory provisions. This control and guidance are intended to protect the interest of the public. The property owned and possessed as a member of cooperative society is held to be heritable and alienable. Such rights could be sold in execution by a court sale. A bona fide purchaser for valid consideration of such rights would get an unimpeachable title and the purchaser can seek membership of the society and his prayer for membership cannot be denied on flimsy and unreasonable grounds. The members of the governing body of a cooperative society could be nominated by State Government to serve the public purpose. If two cooperative societies could be merged and amalgamated by State intervention, there cannot be any challenge against the same on the ground that the same would abridge or take away the rights conferred by Article 14 or Article 19 of the Constitution. Therefore, it is clear that there is all pervading control by the statute over the function and composition of the cooperative societies and courts have consistently held that such interference does not violate the freedom of association guaranteed under Article 19(1)(c) of the Constitution. As the property owned by a member of the housing society is inheritable and alienable, these

rights cannot be restricted except under an express provision of law. The byelaws of the society expressly prohibited a non-Parsi being a member of the housing society and the same cannot be said to be reasonable as the denial is solely based on his membership of a particular community.

17. The appellant-Society must have been initially founded by persons belonging to minority community but in view of the statutory restrictions, it cannot be contended that the membership of the society would be restricted to Parsis a....

imposed, it would amount to a restraint on alienation. When the property obtained as a member of the cooperative housing society is held to be heritable and alienable, no such restraint could be imposed on the member. It may be noted that right of pre-emption was challenged before the Honourable Supreme Court and in Bhau Ram v. Baij Nath Singh and others, AIR 1962 SC 1476, it was held by the Honourable Supreme Court that the right of pre-emption on the ground of vicinage was held to be an unreasonable restraint on right of alienation, and speaking for majority, His Lordship Wanchoo, J. held in paragraph 7 at page 1481 as under :-

"... Though therefore, the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which has been populated by a particular fraternity or class of people. In effect, therefore, the law of pre-emption based on vicinage was really meant to prevent strangers i.e. people belonging to different religion, race or caste, from acquiring property. Such division of society now into groups and exclusion of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire, hold and dispose of property as now guaranteed under Art. 19(1)(f), for it is impossible to see such restrictions as reasonable and in the interests of the general public in the state of society in the present day...."

(emphasis supplied)

Though the fundamental right to acquire, hold and dispose of property guaranteed under Article 19(1)(f) is no longer available as fundamental right, it nevertheless is an incidence of property and continues as basic right available to a citizen and the above observation made by the Honourable Supreme Court has great persuasive effect when considering similar question.

18. Having considered all relevant aspects, we do not think that the appellant-Society can insist that their byelaw providing exclusion of non-Parsis as members is not liable to be amended. The learned single Judge rightly declined the reliefs sought for and we find no merit in the appeal, and it is accordingly dismissed. No costs.

On pronouncement of the judgment, learned counsel for the appellant prayed that the operation of the judgment be stayed for a period of six weeks. We are not inclined to grant the prayer. The prayer is declined.

23rd July, 1999 (K.G. Balakrishnan, C.J.)

(S.D. Dave, J.)

(apj)